SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 330.

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

IDA MAY SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL, DECEASED.

REPLY BRIEF OF PETITIONER.

Respondent has just filed her brief in this case and now seems to take the position that the case was tried below solely upon the theory of the negligence of Fonveille, the General Yardmaster, in failing to prevent the manslaughter.

Counsel take the position, without any evidence in the record to sustain it, that Fonveille ought to have known where Southwell was because two other men at places other than where Fonveille was had seen

Southwell. The map attached to our brief shows that prior to the time Southwell came out of the wash room neither Fonveille nor Dallas were in a position to see him or know where he was. Southwell, it will be noted, was in the office and Fonveille and Dallas had been at the butting block, shown as F. The came from the butting block through the gates and passageway and could not possibly have seen Southwell because there were walls between. It must be borne in mind that all of the testimony in this case comes from plaintiff's witnesses, and the positive testimony from Fonveille is that he did not know where Southwell was and had not seen him.

Since the writ was granted this Court has handed down the following decisions which we contend substantiate petitioner's position that there was no negligence chargeable against the petitioner in this case under the Federal Employers' Liability Act:

St. Louis and San Francisco Railroad vs. *Mills*, 271 U. S., 344;

Chicago, Milwaukee & St. Paul Railroad vs. *Coogan*, 271 U. S., 472;

Atlantic Coast Line Railroad Company vs. *Wimberly*, decided March 21, 1927.

In the instant case the Supreme Court of North Carolina relied somewhat upon the case of *Wimberly vs. Railroad*, 190 N. C., 447, and that case this Court has reversed.

The *Mills* case is directly in point. There, during this same Shopmen's Strike in 1922, an employee of

the Railroad Company was shot and killed by strikers while going home on the street car under guard furnished by the railroad. The court held in that case that there was not sufficient evidence to be submitted to the jury upon the question of the negligence of the company in failing to furnish proper police protection.

Counsel argue that if Fonveille did not actually know Southwell was on the terminal he was put upon inquiry in this respect when he discovered that Dallas was armed with a pistol and first expressed his purpose to see Southwell and ask him to lay off of him, and having thus been put upon inquiry he made no effort to ascertain where Southwell was, and from this they argue the Railroad Company was negligent.

Surely, under the decisions of this Court, there must be evidence produced to show that Fonveille had knowledge of Southwell's presence, or reason to believe he was present, and of the intention of Dallas to shoot Southwell. The evidence is to the contrary from respondent's own witnesses and there is nothing in the record but conjecture. The case really was allowed to go to the jury without evidence of negligence, and it was permitted to infer negligence from inferences. As said in the *Mills* case, page 477:

> "Whenever circumstantial evidence is called on to prove a fact the circumstances must be proved and not themselves presumed."

We respectfully submit that there is error in the affirmance of the judgment of the trial court.

Respectfully submitted,

THOMAS W. DAVIS,
Attorney for Petitioner,
Atlantic Coast Line Railroad Company.

J. O. CARR,
V. E. PHELPS,
Of Counsel.

WILMINGTON, N. C., *April* 13, 1927.

Service of copy of this brief accepted this 13th day of April, 1927.

J. BAYARD CLARK,
By L. CLAYTON GRANT,
L. CLAYTON GRANT,
Attorneys for Respondent.

CASES CITED IN BRIEF.